

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JAMES P. CHASSE, JR., et al., )

Plaintiffs, )

v. )

CHRISTOPHER HUMPHREYS, et al., )

Defendants. )

No. CV-07-189-HU

OPINION & ORDER

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1 - OPINION & ORDER

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14 dba KGW-TV, City of Roses Newspaper Company dba Willamette  
Week, Fisher Communications, Inc. dba KATU-TV, Meredith  
15 Corporation dba KPTV-Channel 12, Montecito Broadcast Group  
dba KOIN-TV, Oregonian Publishing Company, and Pamplin Media  
16 Group dba The Portland Tribune

17 HUBEL, Magistrate Judge:

18 Plaintiffs in this case bring civil rights and other claims  
19 against the City of Portland, two individual Portland Police Bureau  
20 (PPB) officers, unnamed City of Portland firefighters/paramedics,  
21 Multnomah County, an individual Multnomah County Sheriff's Deputy,  
22 Tri-Met, and American Medical Response (AMR) Northwest, Inc. The  
23 action arises out of the death of plaintiff James P. Chasse, Jr. on  
24 September 17, 2006, while in custody of the PPB.

25 Presently, plaintiffs move to compel certain documents from  
26 the City defendants [#151]. Plaintiffs separately move for a  
27 protective order requiring that parties and witnesses be  
28 sequestered during depositions [#161]. I grant in part and deny in

1 part the motion to compel. I deny the motion for protective order.

2 I. Plaintiffs' Second Motion to Compel

3 After filing the second motion to compel, plaintiffs and the  
4 City defendants successfully narrowed the disputed issues to three:

5 (1) the production of Internal Affairs Division (IAD) and  
6 Independent Police Review Division (IPR) documents requested in  
7 plaintiffs' requests for production #114 and #115, and which  
8 concern an ongoing, incomplete investigation; (2) the production of  
9 documents related to a shooting death by PPB Lieutenant Jeff Kaer,  
10 sought in request for production #116; and (3) the provision of  
11 releases signed by defendants Humphreys and Nice to plaintiffs for  
12 plaintiffs' use in obtaining certain documents from the Portland  
13 Office of the Federal Bureau of Investigation and the United States  
14 Attorney's Office in the District of Oregon, sought in requests for  
15 production #129 and #130.

16 A. Documents from Ongoing IAD and IPR Investigations

17 The City defendants are ordered to produce any factual matter  
18 contained in any IAD or IPR files responsive to requests for  
19 production #114 and #115, by December 10, 2007, and to promptly and  
20 regularly supplement the production of such materials as required  
21 under Rule 26(e). Any documents which are in the form of  
22 conclusions or resolutions of a complaint, may be produced at the  
23 completion of the investigation.

24 B. Documents Re: the Shooting Death Involving Kaer

25 Consistent with my October 16, 2007 Order which limited  
26 plaintiffs' earlier document requests for officer-involved deaths  
27 to non-shooting deaths, I deny this motion.

28 / / /

1 C. Releases

2 Plaintiffs' requests for production #129 and #130 seek  
3 documents describing, evidencing, or relating to any file created  
4 or maintained on or related to Humphreys (#129) or to Nice (#130),  
5 by the following agencies: the Federal Bureau of Investigation,  
6 the United States Attorney General, the United States Department of  
7 Justice, or the Department of Homeland Security, and/or any other  
8 federal agency or entity regarding Humphreys (#129) or Nice (#130)  
9 and/or his actions and conduct. Alternatively, plaintiffs ask  
10 Humphreys and Nice to sign releases enclosed with the requests for  
11 production.

12 The City defendants have provided any documents responsive to  
13 these two requests that they possess. They refuse to provide the  
14 signed releases. As a result of ongoing discussions between the  
15 parties, plaintiffs limit this motion to documents from the  
16 Portland Office of the Federal Bureau of Investigation, and the  
17 United States Attorney's Office for the District of Oregon.

18 I deny the motion. As a result of documents previously  
19 produced to plaintiffs, plaintiffs believe that these two federal  
20 agencies may have documents pertaining to a complaint made against  
21 Humphreys. The City has already provided plaintiffs with any IAD  
22 or IPR files regarding this particular complaint. The City  
23 defendants contend they are under no obligation to provide a  
24 release to plaintiffs to aid plaintiffs in their search. They  
25 maintain that plaintiffs may serve a subpoena on the particular  
26 federal agency to obtain the documents. Plaintiffs' counsel noted  
27 that in his experience in other cases, such subpoenas are met with  
28 privacy and confidentiality arguments to resist the production of

1 the documents, and thus, he seeks the releases to expedite  
2 production.

3 Plaintiffs offer no authority, either in the written materials  
4 or at oral argument, to support their position that the Court is  
5 empowered to order a party to sign a release such as plaintiffs  
6 request here. Plaintiffs rely only on the general provisions of  
7 Rule 26. Because the likelihood that either of these two federal  
8 agencies possess documents that would lead to the discovery of  
9 admissible evidence is so remote given that the previously-produced  
10 evidence shows that the United States declined prosecution of the  
11 complaint against Humphreys, I decline to exercise my discretion,  
12 if the Court has any, to order Humphreys and Nice to provide signed  
13 releases to plaintiffs.

#### 14 II. Sequestration Motion

15 Plaintiffs move to sequester the three officer defendants  
16 (Humphreys, Nice, and Burton), from attending each others'  
17 depositions and to prohibit contact among the officer defendants  
18 regarding the substance of their respective deposition testimony,  
19 until the conclusion of their depositions, and the depositions of  
20 all other sequestered witnesses or parties. Plaintiffs further  
21 move to sequester Multnomah County corrections nurses Patricia  
22 Gayman and Sokunthy Eath, from attending each others' depositions  
23 and to prohibit contact between the nurses regarding the substance  
24 of their respective deposition testimony, until the conclusion of  
25 their depositions, and the depositions of all other sequestered  
26 witnesses or parties. Lastly, plaintiffs move to sequester AMR  
27 Northwest emergency medical technicians (EMTs) Tamara Hergert and  
28 Kevin Stucker, from attending each others' depositions and to

1 prohibit contact between the EMTs regarding the substance of their  
2 respective deposition testimony, until the conclusion of their  
3 depositions, and the depositions of all other sequestered witnesses  
4 or parties.

5 Plaintiffs further seek an order prohibiting the attorneys for  
6 any of the defendants, and the agents or employees of any of those  
7 attorneys, from informing any sequestered officer defendant or any  
8 sequestered witness of the substance of the deposition testimony of  
9 any sequestered officer defendant or sequestered witness, until  
10 after all of the sequestered officer defendants and other  
11 sequestered witnesses have completed their depositions. Finally,  
12 plaintiffs seek an order prohibiting the sequestered officer  
13 defendants and sequestered witnesses from obtaining a copy or  
14 summary of their own, or any other person's deposition transcript,  
15 or any portion thereof, until all depositions of the sequestered  
16 officer defendants and the sequestered witnesses have been  
17 completed.

18 As of December 1, 2007, the governing rule is Rule 26(c)(1)(e)  
19 which states that "[a] party . . . may move for a protective order  
20 . . . . The court may, for good cause, issue an order to protect a  
21 party or person from annoyance, embarrassment, oppression, or undue  
22 burden or expense, including one or more of the following: . . .  
23 (E) designating the persons who may be present while the discovery  
24 is conducted." Fed. R. Civ. P. 26(c)(1)(E).<sup>1</sup>

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26 <sup>1</sup> Before December 1, 2007, the governing rule was Rule  
27 26(c)(5). Though the wording in Rule 26(c)(1)(E) slightly  
28 modifies former Rule 26(c)(5), there is no basis for concluding  
that any change in meaning was intended or that cases decided  
under Rule 26(c)(5) would not apply to motions based on Rule

1 Plaintiffs contend that the broad language of the rule  
2 authorizes the Court, where justice requires, to restrict  
3 attendance of witnesses at depositions, and to restrict  
4 communications during the deposition process between witnesses. I  
5 agree with plaintiffs that the rule empowers the Court to make such  
6 orders.

7 The question, however, is how the Court determines that  
8 sequestration is appropriate in any given case. All parties appear  
9 to agree that the testimony of witnesses who accurately recall  
10 events at issue, is a critical part of the truth seeking process  
11 culminating in trial. Plaintiffs suggest that allegations of  
12 conspiratorial conduct in a complaint, combined with questions of  
13 credibility and the credibility advantage enjoyed by certain  
14 witnesses, especially law enforcement witnesses, is sufficient to  
15 impose a sequestration order in order to best keep a witness's  
16 recollection untainted by any aids and thus, to secure the truth.  
17 Defendants suggest that memory is often best kindled in the context  
18 of conversation with others, or by having forgotten memories  
19 jogged. Thus, defendants argue that sequestering witnesses during  
20 discovery can impede the ability of the witness to accurately  
21 remember what he or she observed or did.

22 As defendants note, if allegations of a conspiracy along with  
23 credibility issues were enough to warrant sequestration, witnesses  
24 in every case with a conspiracy allegation and in every 42 U.S.C.  
25 § 1985 conspiracy case, would be sequestered. Indeed, this might  
26 implicate such sequestration orders in any case where intent or

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27  
28 26(c) (1) (E) .

1 motivation is an issue, or where police officer testimony is  
2 contrasted with civilian testimony. At the other extreme, as  
3 plaintiffs note, if an argument that "memories work best  
4 interactively or upon prompting" is enough to defeat a witness  
5 sequestration request, courts would never grant a sequestration  
6 motion.

7 Because neither of these approaches is tenable, courts have  
8 required the presence of exceptional circumstances and specific  
9 facts before allowing a motion to sequester witnesses or parties  
10 during depositions. E.g., Dade v. Willis, No. Civ. A. 95-6869,  
11 1998 WL 260270, at \*1 (E.D. Pa. Apr. 20, 1998) (requiring finding  
12 of extraordinary circumstances before excluding a party from  
13 proceedings); In re Levine, 101 B.R. 260, 262 (Bankr. D. Col. 1989)  
14 (requiring "strong and compelling reasons" to separate witnesses);  
15 BCI Commc'n Sys., Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D.  
16 154, 159-60 (N.D. Ala. 1986) (concluding that the defendant had  
17 failed to establish good cause when it presented no compelling or  
18 exceptional circumstances and instead presented only "garden  
19 variety" or "boilerplate" "good cause facts" which exist in most  
20 civil litigation). Moreover, as Dade recognized, the court should  
21 examine the circumstances of the parties and issues involved and  
22 require a specific showing of good cause. 1998 WL 260270, at \*1.

23 Plaintiffs and defendants in the instant case have cited cases  
24 supporting their respective positions. Cases on both sides exist  
25 largely because of the individualized nature of the appropriate  
26 inquiry. My review of the circumstances and issues involved in the  
27 instant case compel me to conclude that the requisite compelling,  
28 extraordinary, or exceptional circumstances, are absent here.



1 First, none of the cases cited by plaintiffs indicate that the  
2 witnesses to be sequestered had previously given statements  
3 concerning the events at issue. Here, plaintiffs already have  
4 received statements made by Humphreys and Nice soon after Chasse's  
5 death, as well as interview documents of the corrections nurses  
6 also generated soon after Chasse's death. These prior statements  
7 should provide a barometer of sorts by which plaintiffs can judge  
8 the accuracy of these particular witnesses' testimony during  
9 deposition or at trial.

10 Second, some of the cases cited by plaintiff fail to  
11 articulate an appropriate standard for determining good cause and  
12 thus, they are unpersuasive. In Dunlap v. Reading Company, 30  
13 F.R.D. 129, 131 (E.D. Pa. 1962), the court found "good cause" for  
14 sequestration under former Rule 30(b), because the ten witnesses  
15 subpoenaed for deposition were employed by the one defendant. In  
16 my opinion, simply being employed by the same employer does not  
17 demonstrate compelling or exceptional circumstances. Additionally,  
18 the witnesses and parties plaintiffs seek to sequester in this  
19 case, work for three different employers, and thus, the concern  
20 expressed by the Dunlap court regarding the camaraderie of  
21 employees working together, is diminished in this case.

22 In Beacon v. RM Jones Apartment Rentals, 79 F.R.D. 141, 141-42  
23 (N.D. Ohio 1978), the court failed to articulate any standard of  
24 good cause to support its conclusion that the witnesses in a  
25 housing discrimination case should be sequestered. Following  
26 Beacon would lead to the absurd practice of sequestering witnesses  
27 in every discrimination case where requested.

28 Third, while the Bankruptcy Court of the District of Colorado

1 allowed a sequestration motion in In re Levine, the facts suggested  
2 that the alleged conspiracy was committed by those with  
3 longstanding and close relationships, and that the financial  
4 history of the parties was not a garden variety or boilerplate  
5 type, but was rather extraordinary. 101 B.R. at 262. In contrast,  
6 in the instant case, there is no evidence that the three distinct  
7 subgroups of witnesses (officer defendants, corrections nurses,  
8 EMTs), have any past, or present, relationship. I acknowledge that  
9 within any one of these groups, there may be longstanding and close  
10 relationships, but I do not consider that fact alone to be  
11 sufficient to establish good cause.

12 Fourth, in Dade, as defendants note, the court's conclusion  
13 there was primarily based on the fact that other than the police  
14 officers on the one hand, and the defendant on the other, there  
15 were no witnesses to the event. 1998 WL 260270, at \*2-3. Here,  
16 there were independent citizen witnesses to the events at Northwest  
17 13th Avenue and Everett Street. While there were no witnesses  
18 during the time Chasse was traveling in the police car from that  
19 location to the precinct, and apparently, no independent non-county  
20 witnesses at the jail, the presence of independent witnesses at the  
21 time the incident began and during what appears to be the  
22 escalation of the police officers' conduct, distinguishes this case  
23 from Dade.

24 Even if Dade were not distinguishable on this account, I would  
25 decline to follow its conclusion to the extent the Dade court  
26 suggests that the combination of civil rights claims, limited  
27 witnesses, police officer partners who are defendants with an  
28 interest in the outcome of the case, and credibility a key issue,

1 produces extraordinary circumstances justifying a sequestration  
2 order. If this were the standard, every 42 U.S.C. § 1983 excessive  
3 force case would require sequestration.

4 Fifth, the sealed filings plaintiffs rely on in support of  
5 this motion, do not suggest any inappropriate actions by any  
6 attorney, any witnesses, or any investigator. Thus, the sealed  
7 filings do not demonstrate extraordinary circumstances justifying  
8 sequestration.

9 Plaintiffs do not require sequestration of witnesses and  
10 parties during depositions to test a witness's perception,  
11 recollection, and honesty. Rather, they may rely on cross-  
12 examination to explore these issues. At deposition, plaintiffs are  
13 entitled to ask, in addition to a variety of other questions, who  
14 a witness spoke to and when, and, unless privileged, the content of  
15 these conversations.

16 I recognize that some of the cases suggest that the good cause  
17 standard for sequestering witnesses may be less rigorous than the  
18 standard used for sequestering parties. E.g., Hines v. Wilkinson,  
19 163 F.R.D. 262, 266 (S.D. Ohio 1995) (noting that factors that  
20 might justify the exclusion of non-parties from a deposition might  
21 not be sufficient to exclude parties). However, on the record  
22 before me in this case, I find no basis for excluding either  
23 witnesses or parties.

24 Finally, I note that while sequestration can be appropriate in  
25 the right circumstances, it can interfere with an attorney's  
26 efforts to effectively represent a client. The "search for truth"  
27 includes assisting clients and witnesses in accurately and fully  
28 recalling events at issue. This can include accurately letting

1 them know what other witnesses recall. There is nothing  
2 presumptively sinister about an attorney's efforts assisting a  
3 witness in this effort, as long as the attorney makes it clear to  
4 the witness that he or she is to tell the truth as they recall it,  
5 not as someone else does.

6 Here, plaintiffs argue that this is not a garden variety case  
7 but instead, is one with extraordinary circumstances justifying  
8 sequestration of witnesses and parties during deposition, and  
9 further justifying an order that counsel not divulge the contents  
10 of a deposition to another sequestered party or witness. In  
11 support of this position, plaintiffs rely only on the fact that  
12 they allege a conspiracy, the fact that some of the subgroups of  
13 defendants work together, and the unpersuasive facts in the sealed  
14 filings. In my opinion, this does not amount to good cause.<sup>2</sup> I  
15 do, however, instruct counsel to instruct their clients and their  
16 witnesses to tell the truth as they remember it.

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22 <sup>2</sup> The City defendants' request, contained in their  
23 "Response to Plaintiffs' Counsel's November [20], 2007  
24 Declaration in Support of Plaintiffs' Amended Motion for  
25 Protective Order," to strike Plaintiffs' Counsel's November 20,  
26 2007 Declaration in Support of Plaintiffs' Amended Motion for  
27 Protective Order, is denied. The City defendants' request,  
28 contained in their "Response to '2nd Declaration of Plaintiffs'  
Counsel in Support of Plaintiffs' Second Motion to Compel  
Discovery Against City Defendants,'" to strike the Second  
Declaration of Plaintiffs' Counsel in Support of Plaintiffs'  
Second Motion to Compel, is denied.

CONCLUSION

Plaintiffs' second motion to compel (#151) is granted in part and denied in part. Plaintiffs' motion for protective order sequestering witnesses and defendants during depositions (#161) is denied.

IT IS SO ORDERED.

Dated this 5th day of December, 2007.

/s/ Dennis James Hubel  
Dennis James Hubel  
United States Magistrate Judge